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No. 86-1433

In the Supreme Court of the United States

OCTOBER TERM, 1986

ESTATE OF WALTER LARKINS, DECEASED,
BY HIS ADMINISTRATRIX, MABEL LARKINS,
Petitioner,

v.

FARRELL LINES, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I. Did the trial court properly decline to give petitioner's proposed jury instructions on *res ipsa loquitur* when none of the essential three elements of *res ipsa loquitur* was present in the case and petitioner failed to object to the jury charge as required by Rule 51 of the Federal Rules of Civil Procedure?

II. Did the trial court correctly entrust to the jury the questions of whether, based upon all direct and circumstantial evidence presented at trial, respondent was negligent or respondent's vessel was unseaworthy and whether respondent was a cause in whole or in part, directly or indirectly, however small, in the loss of Mr. Larkins' life?

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STATEMENT OF THE CASE

The Facts

Generally, respondent vessel owner agrees with petitioner's factual statement of the case, but there are certain significant, relevant omissions which should be called to the Court's attention.

Walter Larkins disappeared at sea on the night of June 13-14, 1982 (A640).[1] Larkins, 55 years old at the time of his death, was employed as a utility man aboard the AUSTRAL PIONEER. His duties aboard ship consisted of cleaning and maintaining the officers' quarters (A338, 339, 691).

* Respondent has no corporate parents, subsidiaries or affiliates.

[1] References to the Joint Appendix filed in the Fourth Circuit are designated "A" followed by the appropriate page number.

When Larkins was 52 years old, he began to have epileptic seizures (A690-693). He also suffered from high blood pressure. Larkins reported regularly to various medical facilities for examination and medication for epilepsy as well as high blood pressure. His doctors knew he was a merchant seaman and that he would be at sea for long periods; thus, his prescriptions were for several months' duration and he was able to function normally for such periods (A125-126, 141, 144). It was appropriate for an epileptic to perform the type of work performed by Larkins (A273-274).

On two occasions prior to the voyage on which he disappeared, Larkins had seizures aboard the AUSTRAL PIONEER. The first occasion was on voyage 4 when the vessel was in Auckland, New Zealand (A206). The medical log for August 17, 1980 notes that Larkins collapsed on board at 11:48 a.m. and was returned to the vessel at 3:15 p.m. "fit for duty – told to rest for one day after his epileptic attack" (A644). The second incident was during voyage 10 on December 27, 1981. The 9:45 p.m. entry noted that Larkins was having a seizure, that at 9:48 p.m. "Mr. Larkins came out of the seizure appeared o.k. These occur about every three-four months" (A646). The officers aboard the ship on Larkins' final voyage had not been aboard during voyages 4 or 10 (A398).

Farrell Lines required its seamen to undergo a pre-sign-on physical examination which was turned over to the ship's officers prior to the voyage (A244, 330). Larkins had undergone five such pre-sign-on examinations in which he admitted to taking medication for hypertension, but specifically denied any history of epilepsy (A248-256, 676-685). His most recent physical was on May 19, 1982, immediately prior to signing articles for voyage 13, his final voyage, on May 24, 1982 (A658, 685).

On June 11, 1982, Larkins was found unconscious in the Chief Steward's office. Chief Mate Herne came to the office when notified and, after a short time, Larkins regained consciousness, appeared embarrassed, but was otherwise perfectly normal (A189-190, 389). He said he had forgotten to take his blood pressure pills which sometimes caused him to faint. Chief Mate Herne believed him. His own wife fainted when she failed to take her blood pressure pills (A199). Dr. Niedermeyer con-

sidered failure to take blood pressure pills a plausible explanation for Larkins' fainting (A284). Larkins was sent to his room to rest for the remainder of the day and performed no duties. Thereafter, he appeared to be perfectly normal. The next morning, he resumed his regular duties and continued to perform those duties through June 13, 1982 (A189-190, 208, 344-345).

When Larkins was discovered missing on the morning of June 14, 1982, the general alarm was sounded, the crew was mustered and the AUSTRAL PIONEER reversed course. Extra lookouts were posted and "man overboard" messages were sent to all ships (A657; SA47-48)[2]. The search of the vessel continued throughout the backtracking. The vessel continued on her reverse course for thirteen hours, until 11 p.m. on June 14, at which time the vessel reached her June 13, 8 p.m. position, the last time anyone had spoken with Larkins (A657). The sea search was negative and it was presumed Larkins was lost at sea.

The room where Larkins slept was located in the approximate center of the crew berthing spaces on the upper deck of the AUSTRAL PIONEER (A665-666). The ship's rail on the upper deck was 41 and one-half inches high. (A356-357). The ship's rail at the main deck was 43 inches high. (A357, 666). Larkins was five feet seven inches tall (A84).

The only medical expert who testified as to the possible causes of Larkins' disappearance at sea was Dr. Ernst Niedermeyer, Director of the Adult Seizure Clinic and an Associate Professor of Neurology and Neurological Surgery at Johns Hopkins University. Dr. Niedermeyer used his expertise as an epileptologist to rule out the possibility that Larkins fell overboard during either a grand mal seizure or a temporal lobe attack. Dr. Niedermeyer's opinion was that Larkins had committed suicide (A285-286). He testified about the known high correlation between epilepsy and suicide (A291).

The Suit

Petitioner, Mrs. Larkins, sued respondent, Farrell Lines, claiming that her husband's death was due to respondent's

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[2] References to the Supplemental Appendix are designated "SA" followed by the appropriate page number. The Supplemental Appendix is attached to the end of respondent's brief to the Fourth Circuit.

neligence under the Jones Act, 46 U.S.C. § 688, and the unseaworthiness of the AUSTRAL PIONEER under the general maritime law (A6). A jury trial was held in the United States District Court for the District of Maryland in October 1983.

The trial court instructed the jury that "under the [Jones] Act, if an employer's negligence played any part, even the slightest in producing the loss, the employer is considered negligent." (A610). The "even the slightest" language was repeated in the charge (at A611) and once again on the special verdict form itself which asks the jury, "Did defendant's negligence cause or contribute even in the slightest to Walter Larkins' death?" (SA106-107).

Similarly, the special verdict form required the jury to decide whether the AUSTRAL PIONEER was unseaworthy at the time Larkins died and, if so, "Did the AUSTRAL PIONEER's unseaworthiness cause or substantially contribute to Walter Larkins' death?" (SA 106-107).

The jury was also instructed that "the law makes no distinction between direct and circumstantial evidence" (A607). Circumstantial evidence was defined for the jury as "proof of a chain of circumstances pointing to the existence or nonexistence of certain facts" (A607). The jury was instructed that if it found negligence by the ship owner, it must then decide whether the defendant's negligence "caused or contributed to the loss" (A614). The jury was told that its verdict must be for the plaintiff on the question of negligence if defendant "was a cause in whole or in part, directly or indirectly, however small, in the loss of Mr. Larkins' life" (A614).

Counsel for petitioner submitted various jury instructions on *res ipsa loquitur*. The proposed instructions were among those discussed in a chambers conference over a period of five and one-half hours on Saturday, October 22, 1983 and continued on Monday, October 24, 1983 (A627-628). On the record, the trial judge inquired of counsel for petitioner as to how the doctrine applied here. Counsel replied:

> So, what we have here is a situation where the rule of permissible inference from unexplained events is characterized as the court's special brand of res ipsa loquitur, and I have the case cited.

Now, here is something else . . .
(A240-241).

Res ipsa loquitur was not mentioned again until the court ruled that the instruction was inappropriate (A428). Petitioner's Brief quotes only a portion of Judge Howard's ruling. *See* Petitioner's Brief at 5, App. 11. The judge invited petitioner's counsel to state his position: "Do you want to be heard on the res ipsa situation?" The reply by counsel was, "No, sir, not on the res ipsa." (A429).

Contrary to the assertion in Petitioner's Statement of the Case (Petitioner's Brief at 5), Petitioner failed to take exception to the court's decision not to instruct on *res ipsa loquitur* as required by Rule 51 of the Federal Rules of Civil Procedure (A624-625).

The jury found that respondent was not negligent and that the AUSTRAL PIONEER was seaworthy. Therefore, they never reached the questions of whether respondent's negligence caused or contributed even in the slightest to Walter Larkins' death or whether the AUSTRAL PIONEER's unseaworthiness caused or substantially contributed to Larkins' death (SA106-107). Judgment was entered for respondent and affirmed by the Court of Appeals for the Fourth Circuit, 806 F.2d 510 (4th Cir. 1986). Petitioner seeks review of that affirmance. Respondent opposes petitioner's request.

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied because petitioner failed to preserve the issue for appeal, the decision below is correct and the failure to give the requested *res ipsa loquitur* instruction is moot because the jury never reached the issue of causation.

I. PETITIONER FAILED TO PRESERVE THE ISSUE FOR APPEAL

Counsel for petitioner excepted to many jury instructions. However, with regard to *res ipsa loquitur*, he said only, "[A]nd lastly, relative to all our instructions that would pertain to the theory of *res ipsa loquitur* relative to the instructions that were—excuse me, your honor," (A625). A discussion took place

off of the record after which counsel switched to an entirely new subject, never returning to *res ipsa*.

Rule 51 of the Federal Rules of Civil Procedure clearly states:

> No party may assign as error the giving or the failure to give an instruction unless he *objects thereto* before the jury retires to consider its verdict, *stating distinctly the matter to which he objects and the grounds of his objection.* (Emphasis supplied.)

Petitioner's objection, which does little more than mention the words *res ipsa loquitur*, "is not even remotely in accord with Rule 51." *St. Paul Fire & Marine Insurance Co. v. Piedmont Natural Gas Co.*, 397 F.2d 263, 264 (4th Cir. 1968). The purpose of Rule 51 is to inform the trial judge of possible errors so that he may have an opportunity to correct them. *Haywood v. Ball*, 586 F.2d 996, 1000 (4th Cir. 1978), *modified on other grounds*, 634 F.2d 740 (1980); *T.C. Allen Construction Co. v. Stratford Corp.*, 384 F.2d 653, 657 (4th Cir. 1967). This case demonstrates why trial counsel must state "distinctly the matter to which he objects and the grounds of his objection." Judge Howard sought guidance, but was given none (A241, 429). Rule 51 is designed to prevent litigants from covertly relying upon error to ensure a new trial in the event of an adverse verdict. *Missouri Pacific Railroad Co. v. Star City Gravel Co.*, 592 F.2d 455, 459 (8th Cir. 1979).

When Judge Howard had earlier inquired of counsel for petitioner as to how the doctrine of *res ipsa* applied to this case, counsel gave an unresponsive one-sentence answer and quickly moved to another subject (A240-241). *Res ipsa* was not mentioned again until Judge Howard ruled that the proposed instructions were inappropriate (A428). He invited petitioner's counsel to state his position: "Do you want to be heard on the res ipsa situation?" Counsel replied, "No sir, not on the res ipsa." (A429).

The mere submission of proposed instructions, without more, is not tantamount to an exception to the court's failure to give the requested instructions. *Kropp v. Ziebarth*, 601 F.2d 1348, 1357 (8th Cir. 1979). Plaintiff cannot now manufacture an issue for reversible error by enlarging and amplifying an objection

that was never made to the trial court. Plaintiff failed to object to the Court's decision not to instruct the jury on *res ipsa loquitur* and has thereby waived any such omission in the charge. *T.C. Allen Construction Co. v. Stratford Corp.*, 384 F.2d 653, 657 (4th Cir. 1967).

II. NONE OF THE THREE ELEMENTS ESSENTIAL TO AN INSTRUCTION ON *RES IPSA LOQUITUR* WAS PRESENT IN THIS CASE

Petitioner correctly states that *res ipsa loquitur* permits, but did not compel, a finding of negligence or unseaworthiness when:

(1) the event does not ordinarily happen in the absence of someone's negligence;
(2) the instrumentality causing the injury was in the *exclusive* control of the defendent (petitioner omits the exclusivity requirement from her formulation of the rule); and
(3) the accident was not due to any voluntary action or contribution by plaintiff.

Olsen v. States Line, 378 F.2d 217, 220 (9th Cir. 1967); Petitioner's Brief at 5-6.

The evidence produced at trial and the conclusions drawn by the jury indicate that it is most likely that Larkins committed suicide (A285-286). Suicide can hardly be considered an event which "does not happen in the absence of someone's negligence." Larkins' act of self-destruction was not a negligent act; it was an intentional act.

Secondly, *res ipsa* applies only if the instrumentality causing the injury was within the "exclusive control" of the defendant at the time of the accident. Because the specific instrumentality that caused Larkins' disappearance is unknown, it is impossible to determine whether that instrumentality was in respondent's exclusive control. Respondent was in control of the AUSTRAL PIONEER itself, but there is no evidence that the condition of the vessel's gear or appurtenances contributed to the disappearance. Moreover, the record is devoid of any evidence pointing to the ship as being the "instrumentality causing the injury."

To argue that the ship is the instrumentality causing Larkins' loss is to argue that the chair is the instrumentality causing the injury when a man ties a noose around his neck and jumps off a chair to complete the deed. The "exclusive control" requirement demonstrates why intentional acts do not properly fit within the *res ipsa* doctrine. There is no basis for application of the doctrine when the thing that caused the loss is under the exclusive control and management of the injured party. *Asprodites v. Standard Fruit & Steamship Co.*, 108 F.2d 728, 729 (5th Cir.), *cert. denied*, 310 U.S. 642 (1940); *Irwin v. United States*, 236 F.2d 774, 776 (2d Cir. 1956).

The third requirement, that the event was not due to any voluntary act or contribution on the part of the plaintiff, is clearly not satisfied. Nothing could have been more voluntary than for Walter Larkins to walk from his bedroom to the end of the passageway, through a dogged and watertight door, to the deck and over the solid guard rail that was more than 41 inches high (A356-357, 666). At the very least, Larkins contributed to the so-called accident:

> If the boiler of a locomotive explodes while the plaintiff engineer is operating it, the inference of his own negligence is at least as great as that of the defendant, and *res ipsa loquitur* will not apply until he has accounted for his own conduct.

Prosser, *Law of Torts* 224 (4th ed. 1971).

The Latin phrase, *res ipsa loquitur*, the thing speaks for itself, originated in *Byrne v. Boadle*, 2 H. & C. 722, 159 Eng. Rep. 299 (1863), in which a barrel of flour rolled out of a warehouse window and fell on an unsuspecting pedestrian. *Byrne* clearly satisfies the three criteria because a flour barrel does not ordinarily roll out of a warehouse window onto a passing pedestrian without someone's negligence; the barrel was within the defendant's exclusive control at the time of the accident; and the accident was certainly not due to any voluntary act or contribution on the part of the passing pedestrian. *See* Prosser at 213. *See also O'Connor v. Chandris Lines, Inc.*, 566 F. Supp. 1275 (D. Mass. 1983) (court applied *res ipsa loquitur* to draw the permissible inference that collapse of upper bunk on defendant's ship was caused by the negligence of defendant); M. Norris, *The Law of Maritime Personal Injuries* § 169, at 552-53

(3d ed. 1987 supp.) The unwitnessed disappearance of a man at sea does not merit the same inferences as a barrel falling on a passing pedestrian or a bunk falling on a ship's sleeping passenger.

III. THE APPLICABILITY OF *RES IPSA LOQUITUR* IS MOOT BECAUSE THE JURY NEVER REACHED THE ISSUE OF CAUSATION

The special verdict form submitted to the jury asked four specific questions about liaibility (SA106-107). It asked if the defendant was negligent and, if so, "Did the defendant's negligence cause or contribute even in the slightest to Walter Larkins' death?" The jury responded unanimously that the defendant was not negligent. Therefore, it never reached the question of causation with regard to negligence.

Similarly, the jury was asked if the ship was unseaworthy at the time of Larkins' death and, if so, did the unseaworthiness "cause or substantially contribute to Walter Larkins' death." The unanimous response was that the ship was seaworthy. Therefore, the issue of causation with regard to unseaworthiness was never reached.

Petitioner cites a variety of cases in her argument in favor of *res ipsa*. However, the cases cited rely upon clear factual findings of negligent or unseaworthy conditions such as slippery decks, or inadequate or non-existent handrailings, structural defects or overloaded cargo. *E.g.*, *Landry v. Two R. Drilling Co.*, 511 F.2d 138 (5th Cir. 1975); *Sweeney v. American Steamship Co.*, 491 F.2d 1085 (6th Cir. 1974); *In re Marine Sulphur Queen, 460 F.2d 89 (2d Cir.), cert. denied*, 409d U.S. 982 (1972). Here, the jury never even got to the issue of causation because it found that respondent's acts were not negligent and that the AUSTRAL PIONEER was seaworthy. Where unseaworthiness is alleged, the "unseaworthy condition must be a cause of injury for a right of action to result." *Fox v. The S.S. Moremacwind* (sic), 285 F.2d 222, 224 (4th Cir. 1960).

Res ipsa applies to a claim of unseaworthiness only when the claimant has established to the satisfaction of the trial court that the vessel was unseaworthy at the time it departed on its last voyage. As the Ninth Circuit stated:

> The sea itself contains many hazards, and an inference of liability of the shipowner for the mysterious loss of his vessel should not be lightly drawn. The court below obviously and properly believed that there could be no foundation for the inference absent satisfactory proof of an unseaworthy condition which might reasonably be expected to relate directly to the sinking of the vessel.

Walston v. Lambertsen, 349 F.2d 660, 662 (9th Cir. 1965), *cert. denied*, 382 U.S. 980 (1966).

Petitioner had to establish to the jury below by a preponderance of the evidence (1) that the respondent was negligent or that the ship was unseaworthy and (2) that the condition proximately caused the death of the seaman who went overboard. *Barrios v. Waterman Steamship Corp.*, 290 F.2d 310, 311 (5th Cir. 1961) (judgment for defendant shipowner affirmed because no proof that any negligence of defendant caused death of seaman. "[O]ne may only speculate as to whether he committed suicide, was the victim of foul play, or went over the side as a result of an accident, a sudden illness, or from some other cause."); *Nolan v. Greene*, 383 F.2d 814, 817 (6th Cir. 1967) (judgment for defendant vessel owner affirmed where no causal connection between drowning and defendant's failure to provide adequate number of fire extinguishers).

In *Rabb v. Canal Barge Co.*, 428 F.2d 201 (5th Cir. 1970), the court affirmed the jury's finding that the defendant was not negligent and the ship was seaworthy in a drowning case. A deckhand who had been on fog watch disappeared at sea and his body was found the next day. Plaintiff argued that defendant's failure to provide adequate lighting and guardrails around the tug made it unseaworthy as a matter of law and required application of *res ipsa* to the unwitnessed, unexplained drowing. The Fifth Circuit disagreed: "Resort to this doctrine, however, is not warranted in the absence of showing at least a malfunction, failure or misuse of the vessel, its appurtenances or gear, or some defect therein." *Id.* at 203. Petitioner herein did not show respondent to be negligent or the AUSTRAL PIONEER to be unseaworthy in any way. The jury's findings render the applicability of *res ipsa* moot.

IV. THE TRIAL JUDGE CORRECTLY INSTRUCTED THE JURY ON ISSUES RELEVANT TO *RES IPSA LOQUITUR*

The Larkins jury was properly charged that "under the [Jones] Act, if an employer's negligence played any part, even the slightest in producing the loss, the employer is considered negligent." (A610) The "even the slightest" language was repeated in the charge (at A611) and once again on the special verdict form itself which specifically asks the jury, "Did defendant's negligence cause or contribute even in the slightest to Walter Larkins' death?" (SA106-107)

The jury was also told that "the law makes no distinction between direct and circumstantial evidence" (A607). Circumstantial evidence was defined as "proof of a chain of circumstances pointing to the existence or non-existence of certain facts" (A607). *See* Prosser at 211-228 (discussing *res ipsa* as a type of circumstantial evidence). Further, the jury was instructed that if it were to find negligence by the shipowner it must then decide whether defendant's negligence "caused or contributed to the loss" (A614). The jury was told that its verdict must be for the plaintiff on the question of negligence if defendant "was a cause in whole or in part, directly or indirectly, however small, in the loss of Mr. Larkins' life" (A614). Despite these strong instructions, the jury's verdict was for defendant.

The instructions submitted by petitioner demonstrate why the trial court properly determined not to give them. For example, Petitioner's proposed jury instruction No. 20 (All) asks the Court to instruct the jury "that the injury to Plaintiff's decedent was proximately caused or contributed to by the treacherous deck." There was no evidence of a treacherous deck. The trial court properly denied petitioner's request to instruct the jury on *res ipsa loquitur* for the many reasons stated.

V. THE FOURTH CIRCUIT'S DECISION IN THIS CASE DOES NOT CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS

Petitioner alleges that the Fourth Circuit's decision in this case "directly conflict[s]" with decisions from other circuits. Petitioner's Brief at 7. Many of the cases cited by petitioner make no mention whatsoever of *res ipsa loquitur* and most of

the decisions emphasize the essential role of the jury in weighing conflicting evidence and arriving at findings or fact. Moreover, significant factual distinctions exist between the case at bar and the cases cited by petitioner. For example, in *In re Marine Sulphur Queen*, 460 F.2d 89 (2d Cir.), *cert. denied*, 409 U.S. 982 (1972), a case which makes no mention of *res ipsa loquitur*, a converted ship carrying molten sulfur was lost at sea. After hearing testimony about the overloading of the ship's cargo on its final voyage and additional testimony by experts as to the extensive structural changes undertaken in the conversion of the ship, the trial court held that the ship was unseaworthy in several respects. *Id.* at 97. The Second Circuit stated that once plaintiffs had sustained their burden as to unseaworthiness, they must then sustain their burden of proving that the unseaworthiness was in fact a cause of the injury. *Id.* at 99. The court found that plaintiffs, assisted by permissible inference as to causation, had proved their case. In the case now before this Court, the jury specifically found that the ship was seaworthy. Accordingly, there was no reason to proceed to questions of causation.

The facts of *Barboza v. Texaco Inc.*, 434 F.2d 121 (1st Cir. 1970), cited by petitioner, are markedly different from the facts now before the Court. In *Barboza*, a pantry man sued for injuries he sustained when he slipped on a zucchini squash while descending the stairway of defendant's vessel. There was little evidence as to how or when the squash got on the stairs. Plaintiff testified that he had cleaned his shoes on a mop ten minutes before descending and that he "couldn't possibly have" tracked the squash onto the stairs himself. *Id.* at 122. The jury found in favor of the plaintiff and the First Circuit affirmed. The factual setting of a man falling on a zucchini squash and injuring himself is vastly different from a man disappearing at sea whose body was never found and the instrumentality or cause of the injury remains undetermined.

Petitioner also cites *Ashland v. Ling-Temco-Vought, Inc.*, 711 F.2d 1431 (9th Cir. 1983), as a case in "direct conflict" with the Fourth Circuit's decision in the case now before the Court. Petitioner asserts:

> [In *Ashland*], the trial court's instruction to the jury that "you may infer that the death of plaintiff's decedent was

> caused by the negligence of the defendants" was affirmed even though the Court of Appeals acknowledged that "the precise cause of the accident remains a mystery," *Id.* at 1439.

Petitioner's Brief at 8. Petitioner is mistaken. In *Ashland*, a military airplane crashed at sea for unknown reasons. The case was tried to the court with an *advisory* jury under Rule 39(c) of the Federal Rules Civil Procedure. At the close of the evidence, the district court determined that the elements of *res ipsa* had been established as a matter of law. Accordingly, it instructed the advisory jury, "You may infer that the death of the plantiffs' decedents was caused by the negligence of the defendants." *Id.* at 1435. Applying that instruction, the advisory jury returned the verdict for plantiffs after which the court entered consistent findings of facts and conclusions of law. On appeal, defendants contended that the instruction given was erroneous. The Ninth Circuit stated, "We need not decide whether the instruction was error because of the advisory nature of the jury." *Id.* at 1437. Petitioner apparently interprets this statement as an affirmance of the instruction. The court remanded the case for further proceedings to determine the applicability of *res ipsa* to multiple defendants. *Id.* at 1435. *Ashland*, therefore, is not a case in "direct conflict" with the Fourth Circuit's ruling herein.

As discussed *supra* , Larkins' disappearance at sea does not satisfy any of the three required elements of *res ipsa loquitur*. However, even if *res ipsa* were applicable to this case, no harm was done in refusing to give the instructions requested by petitioner. Petitioner's arguments almost lead one to believe that the trial court had directed a verdict for the defendant. That is, of course, not true. The trial court submitted the case to the jury and instructed it on the value of circumstantial evidence and the light burden to be sustained by petitioner. The jury was free to draw whatever conclusions it wished from the evidence. *Res ipsa loquitur* is nothing more than a form of circumstantial evidence permitting the issue of liability to go to the jury and permitting the jury to draw inferences from the evidence presented. *See* Prosser at 211-228.

In most of the cases from other circuits cited by petitioner, the court deferred to the findings of the jury and affirmed the

judgment of the district court. *E.g., Sweeney v. American Steamship Co.*, 491 F.2d 1085 (6th Cir. 1974); *Barboza v. Texaco Inc.*, 434 F.2d 121 (1st Cir. 1970); *Admiral Towing Co. v. Woolen*, 290 F.2d 641, 649-50 (9th Cir. 1961) ("The trier of fact must be afforded substantial latitude in making this determination [as to how and why the accident occured] even though the evidence supporting it is slight and even though the reviewing court might have arrived at a different conclusion."); *Landry v. Two R. Drilling Co.*, 511 F.2d 138, 142 (5th Cir. 1975) (The jury is entitled to make "permissible inferences from unexplained events.")

VI. THE DECISION BELOW DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

This Court has frequently upheld the right of the jury to weigh conflicting circumstantial evidence in arriving at a verdict. For example, in *Lavender v. Kurn*, 327 U.S. 645 (1946), a switch-tender employed by the railroad was found dead on the ground near the tracks. The autopsy concluded that the deceased was struck in the back of the head by "some fast moving small round object," causing a fractured skull from which he died. 327 U.S. at 648-49. Plaintiff's theory was that the deceased was struck by the mail hook on the outside of the train. Defendant's theory was that the deceased was murdered. There were no eyewitnesses to the death. The jury weighed the evidence and rendered a verdict for the plaintiff. The Missouri Supreme Court reversed, but the United States Supreme Court decided:

. . .

> We hold, however, that there was sufficient evidence of negligence on the part of [defendants] to justify submission of the case to the jury and to require appellate courts to abide by the verdict rendered by the jury.
>
> It is true that there is evidence tending to show that it was physically and mathematically impossible for the hook to strike [the deceased]. And there are facts from which it might reasonably be inferred that [the deceased] was murdered. But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck [the deceased]. The jury having made that inference, the respondents are not free to re-

> litigate the factual dispute in a reviewing court. Under these circumstances, it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury.

327 U.S. at. 652-53 (citations omitted). *See Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 504-07 (1957).

This Court's decision in *Johnson v. United States*, 333 U.S. 46 (1948), is consistent with the decision below in the instant case. In *Johnson*, the Supreme Court applied *res ipsa loquitur* in an admiralty case to permit the trier of fact to draw an inference of negligence from unexplained circumstances. The facts of the Johnson case are similar to the facts of *Byrne v. Boadle*, 2 H. & C. 722, 159 Eng. Rep. 299 (1863), discussed *supra*, the case in which a barrel of flour rolled out of a warehouse window onto a pedestrian. In *Johnson*, plantiff was hit on the head by a block dropped unaccountably from above by his co-worker. The Court found that "on the record either [the co-worker] or petitioner was the cause of the accident and it appears that petitioner was not responsible." 333 U.S. at 48. Accordingly, the Court found that a fair inference could be made that the man who dropped the block was negligent. *Id.* at 50.

In the case at bar, the jury found that respondent was not negligent and the AUSTRAL PIONEER was a seaworthy vessel. The jury reached this conclusion after weighing the circumstantial evidence presented. Petitioner should not be permitted to invade the function of the jury.

Cited as a case "which cuts through the mass of verbiage built up around the doctrine of *res ipsa loquitur*," this Court's decision in *Sweeney v. Erving*, 228 U.S. 233 (1913), upheld the jury's verdict for the defendant. *See Jesionowski v. Boston & Maine Railroad*, 329 U.S. 452, 457 (1947). Plaintiff had allegedly been burned by x-rays conducted by defendant and requested a jury instruction that the occurrence of the accident was itself evidence of negligence and cast upon the defendants the burden of proving, by a preponderance of the evidence, that the injury was not caused by his negligence. 228 U.S. at 238. The Court held that this instruction was properly refused because even in cases where *res ipsa* applies, it does not have the effect of shifting the burden of proof:

> The general rule in actions of negligence is that the mere proof of an "accident" (using the word in the loose and popular sense) does not raise any presumption of negligence; but in the application of this rule, it is recognized that there is a class of cases where the circumstances of the occurrence that has caused the injury are of a character to give ground for a reasonable inference that if due care had been employed by the party charged with care in the premises, the thing that happened amiss would not have happened. In such cases, it is said, *res ipsa loquitur*, — the thing speaks for itself; that is to say, if there is nothing to explain or rebut the inference that arises from the way in which the thing happened, it may fairly be found to have been occasioned by negligence.

228 U.S. at 238-39. (*Sweeney* was cited with approval in the admiralty context. *See Johnson v. United States*, 333 U.S. 46, 48 (1948).) The circumstances of Larkins' death do not give rise to an inference of liability by respondent. Further, even if such inference existed, it was soundly rebutted by the testimony of Dr. Niedermeyer that Larkins most likely committed suicide (A285-286).

Petitioner's argument that the "settled canon of maritime jurisprudence" requires the Court to give rather than withhold remedies to seamen even in doubtful cases (Petitioner's Brief at 12-14) suggests that petitioner should recover merely because the deceased was a seaman and the petitioner filed suit to recover for his death. As demonstrated herein, the jury plays a fundamental rule in the decision-making process of our judicial system. We must not invade its function of weighing conflicting circumstantial evidence and arriving at a just decision.

CONCLUSION

For the reasons stated, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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